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CHARITABLE TRUSTS.

The Supreme Court of Appeals of Virginia recently refused an appeal from the decision of the Corporation Court of the city of Lynchburg, in a suit in chancery, which held an attempted disposition to a charitable institution inoperative and void, because too vague, indefinite and uncertain to be enforced by a court of equity. The petition for an appeal reviews the Virginia decisions on charitable trusts, and presents such questions in connection with the particular trust under consideration as to make the decision of the court in refusing the petition, one of its most comprehensive adjudications on this subject; for that reason, we print it practically in full, as follows:

By the provisions in question practically the whole of the testator's estate, subject to annuities in favor of two of his sisters, was given, for the purpose stated, to a self-perpetuating board of trustees, with the right, if they should think it advisable, to procure a charter of incorporation, and for these provisions reference is made to the will, which, with certain obvious verbal inaccuracies corrected, is as follows:

> "I Winnington L. Moorman, do make this my last will and testament, revoking all others. I give my household and kitchen furniture to my sister, Mary O. Fox, and except said furniture, including what may be derived from my life policies to seven trustees, and in the first instance I wish them to be A. R. Long, O. B. Barker, F. S. Kirkpatrick, Dr. A. W. Terrell, Miss Anna L. Jones, Miss Elsie West Cilliam and Miss Dora Ford, for the establishment, in or near the City of Lynchburg, of a home for widows and old unmarried ladies, to be called 'The Winnington Home,' the terms for admission to which shall be determined by the trustees, except that there shall be no denominational, sectarian or religious prerequisites for admission, and though it is contemplated that life memberships may be sold, it is my wish that admission shall depend on the worthiness of the applicant, rather than on pecuniary considerations. A bare majority of the trustees shall be

chosen from the Baptist churches of Lynchburg, and the others from persons not members of the Baptist denomination, which distinction shall be maintained in subsequent changes of the board of trustees, vacancies shall be filled by the remaining trustees; and the trustees, if they deem it advisable may procure a charter of incorporation. The trustees of 'The Winnington Home' shall pay to my sister, Mary O. Fox, twenty-five dollars per month for life, and to my sister, Lizzie Clark Moorman, of Louisville, Ky., ten dollars per month for life. I wish A. R. Long and Miss Anna L. Jones to be my executor and executrix, and desire that they shall not be required to give security as such. Given under my hand this the 15th day of February, 1910.

"Winnington L. Moorman.

"If any of the trustees that I have chosen refuse to serve, then I wish Court of the City of Lynchburg to appoint substitutes. March the first 1910.

"Winnington L. Moorman."

It is evident that there is no practical, or administrative difficulty in the way of carrying out the benevolent purpose expressed in these provisions; and the scheme for doing so, as formulated by the testator, differs from that approved by this court as valid in Jordan *v.* Richmond Home, 106 Va. 710, only in the agency provided for its administration, which, instead of being a corporation as in that case, is a self-perpetuating board of trustees, who are authorized to secure, and have in fact secured, a charter of incorporation. The lower court, nevertheless, felt itself constrained, by the line of Virginia decisions beginning with Gallego's executors *v.* Attorney General, 3 Leigh 450, decided in 1832, to declare the testator's attempted disposition of his estate inoperative and void, on the ground that it is "too vague, indefinite and uncertain to be enforced by a court of equity."

This line of decisions, abridging the just and legitimate jurisdiction of chancery courts over charitable trusts, is a notable example of the application of the doctrine of stare decisis in perpetuation of error, and in opposition to public interests. It follows Baptist Association *v.* Hart, 4 Wheaton 1, decided in 1819, and long since shown to have been based on a mistake as to the extent of such jurisdiction; and though, when the mistake

was discovered, the authority of that case as a precedent was repudiated by the court in which it was decided, the Virginia courts have continued to follow it. As soon as it was thus unfortunately settled in Virginia that the repeal of the statute of 43 Eliz. placed all charitable uses on the footing of ordinary trusts, and so rendered them incapable of enforcement, the legislature, as stated by Judge Burks in his argument in the Churchman case, "at once set about to repair, to a limited extent, the great mischief that had been done;" and, its attention being apparently directed only to those charitable trusts which were religious and educational, these two classes of trusts were restored by appropriate legislation, one very fully and the other in part. But in respect to these and all other charities the more liberal policy of the State is further indicated by the facilities afforded by legislation for the incorporation of educational, religious, benevolent, or charitable associations which, under § 1, chap. 4, of the Act concerning Corporations (Pollard's Code, 1904, § 1105d), may now secure charters as a matter of right, and with the same effect as if they were directly granted by the legislature, the legislative authority, sanction and approval being thus given in advance to all corporations organized for such purposes.

At present, then, all incorporated charities, and all charities for educational purposes, and some for religious purposes, are, or may be valid in Virginia, and as to all such charities, if declared with reasonable certainty, there is no defect of jurisdictional or administrative capacity in the courts to prevent their enforcement. To exclude other charities as unenforceable is to make a distinction without a difference, and it may well be considered whether the courts, whose administrative competency has now been fully established, should not extend their jurisdiction by analogy to include these other charities also, and so resume the powers of which, by their own mistaken action, they have deprived themselves.

But if not, and the cases referred to must still be regarded as binding, it is submitted that the enforcement of the trust now in question is not inconsistent with a proper recognition of their authority. In support of this proposition it is not necessary to

examine them in detail, but for convenience of reference a list of them is here given in the note.*

The trusts in question in these cases were declared void only in Gallego's Executors *v.* Attorney General, Janey *v.* Latane, Seaburn's Executors *v.* Seaburn, Stonestreet *v.* Doyle, Virginia *v.* Levy and Fifield *v.* Van Wyck, the decision in Virginia *v.* Levy being governed by an adjudication of the New York Court of Appeals on the same trust; and in Hill *v.* Bowman's Executors the trust was declared void only in part, while in Literary Fund *v.* Dawson, of alternate dispositions, one was held to be void and the other upheld as valid. In the other cases the trusts were sustained as gifts to corporations for purposes within the scope of their charters, or as educational or religious trusts made valid by statute. In every case in which the trust was declared void the invalidity was predicated on uncertainty in the designation of the beneficiaries, or objects of the trust, and not on any uncertainty in the designation of the trustees, and in none of these cases were the trustees vested with discretionary authority, or the power of selection, by means of which the uncertainty in respect to the beneficiaries might be removed. This will more fully appear from an examination of these cases on this point.

In the Gallego case the testator, by the second codicil to his

*Gallego's Executors *v.* Attorney General, 30 Va. (3 Leigh) 450 (1832); Janey *v.* Latane, 31 Va. (4 Leigh) 327 (1833); Hill's Executors *v.* Bowman, 34 Va. (7 Leigh) 650 (1836); Literary Fund *v.* Dawson, 37 Va. (10 Leigh) 147 (1839); Literary Fund *v.* Dawson, 40 Va. (1 Rob.) 402 (1842); Brooke *v.* Shacklett, 54 Va. (13 Gratt.) 301 (1856); Seaburn's Executors *v.* Seaburn, 56 Va. (15 Gratt.) 423 (1859); Kelly *v.* Love's Admr., 61 Va. (20 Gratt.) 121 (1870); Virginia *v.* Levy, 64 Va. (23 Gratt.) 21 (1873); Kinniard *v.* Miller's Executor, 66 Va. (25 Gratt.) 107 (1874); Roy's Executor *v.* Rowzie, 66 Va. (25 Gratt.) 107 (1874); Hoskinson *v.* Pusey, 73 Va. (32 Gratt.) 428 (1879); Missionary *v.* Calvert's Administrator, 73 Va. (32 Gratt.) 357 (1879); Cozart *v.* Mandeville's Executor (cited but not reported), 73 Va. (32 Gratt.) 365 (1879); Stonestreet *v.* Doyle, 75 Va. 356 (1881); P. E. Educational Society *v.* Churchman, 80 Va. 718 (1865); Trustees, etc. *v.* Guthrie, 86 Va. 125 (1889); Gallagher *v.* Rowan, 86 Va. 823 (1890); Fifield *v.* Van Wyck, 94 Va. 557 (1897); Jordan *v.* Richmond Home, 107 Va. 710 (1907); Jordan *v.* Universalists Gen. Conv., 107 Va. 79 (1907).

will directed his executors, "if the Roman Catholic Chapel should be continued at the time of his death, to pay one thousand dollars towards its support; and if the Roman Catholic congregation should come to the determination to build a chapel in Richmond, to pay three thousand dollars towards its accomplishment;" by the tenth codicil he directed his executors to lay by two thousand dollars "to be distributed among needy, poor and respectable widows," not otherwise designated; and by the eleventh codicil he gave one-half of a lot of land in Richmond to certain trustees "upon trust to permit all and every person and persons belonging to the Roman Catholic Church as members thereof, or professing the Roman Catholic religion, and residing in the said city of Richmond at the time of his death, to build a church on the said moiety of the said lot of land for the use of themselves and of every other person and persons of that religion who may hereafter reside in the said city of Richmond."

As to the "needy, poor and respectable widows," the will does not otherwise describe or identify them, or afford any means of determining who among them should be the recipients of the testator's bounty; and as to the gifts for the benefit of the Roman Catholic Church, it was said by President Tucker, in his opinion in this case,

> "It is obvious that the bequest here, though for building a church, is a bequest to the Roman Catholic congregation in Richmond, and it is equally obvious that the testator designed no individual benefit to the members of that congregation; yet, as the society or congregation is not incorporated, it may well be asked, who are to be regarded as the beneficiaries entitled to the advantage of this bequest? * * * Whom does the law recognize, or the testator designate as having the power to decide this essential question? Are all who have been baptized in the church within the operation of the will, or those only who are received as partakers of its most solemn ordinances? These and a multitude of like difficulties present themselves to the notion of any grant or conveyance to a religious society, or to trustees for their use. For, in the eye of the law, the intervention of a trustee does not remove a single difficulty. There is not more necessity for a properly defined grantee in a deed, than a cestui que trust, capable of taking, and

> so defined and pointed out that the trust will not be void for uncertainty. In short, there cannot be a trust without a cestui que trust, and if it cannot be ascertained who the cestui que trust is, it is the same thing as if there was none."

This reasoning depends on the fact that there was no one recognized by law, or designated by the testator, to decide who should be regarded as the beneficiaries of his bequest, and the necessary implication is that if there had been some one recognized by law, or appointed by the testator to decide this "essential question," the trust would have been valid. And this is the implication, as will presently be shown, of the reasoning of Chief Justice Marshall also, in Baptist Association *v.* Hart, 4 Wheaton 1, which was the controlling authority in the decision of this case.

In Janey's Executor *v.* Latane the trust in question, provided for in the will of Joseph Janey, was as follows:

> "I give to the school commissioners, and their successors, of South Farnham District, Essex County, for the schooling of the poor children of that district, one thousand dollars, to be put out at interest at six per cent per annum, and the interest only to be applied for the schooling of said poor children."

This bequest was objected to, first, on the ground that there was no such district as South Farnham, which was the name of an old parish, the limits of which, however, were well known, and therefore there was no such body as the school commissioners of that district; and, second, on the ground that there was no legal method of ascertaining the poor children of South Farnham District. The court, with only three judges sitting, and one of them, Judge Carr, in doubt, held the bequest to be void, without delivering an opinion stating the ground of their decision; but as the case was heard on the bill and answer, and the first objection, that there was no such body as the Commissioners of South Farnham District, was not only inconclusive in itself, but depended on an issue of fact, on which there was no evidence, it may be reasonably assumed that the court merely followed the Gallego case and based its decision on the

second objection, namely, that there was no legal method of ascertaining the beneficiaries intended by the testator.

In Seaburn's Executor *v.* Seaburn, 15 Gratt. 420, bequests of Nathaniel Seaburn providing for the erection of two churches at specified places, and setting apart a fund to be invested for the support of the minister of these churches, were held to be inoperative and void "on account of the indefiniteness and uncertainty of the same, and of the beneficiaries," who were to be members of the "Oldside Baptist Denomination," among whom, of course, the executor to whom the execution of the trust was confided, had no power of selection.

In Virginia *v.* Levy, 23 Gratt. 21, a devise by Urish P. Levy of Monticello and other property, for the establishment of an agricultural school, having been declared invalid by the court of appeals of New York, it was held that the question was res judicata, and this court, therefore, did not pass on the validity of the trust.

In Stonestreet *v.* Doyle, 75 Va. 356, a devise by the will of Walter Herron, admitted to probate in 1838 (before the statutes validating trusts for educational purposes were passed) of a valuable lot in Norfolk, the trustee to take charge of it and build thereon a large and commodious academy for the purpose of establishing a free school and extending the education of poor children, was held to be void because of the uncertainty of the beneficiaries who were to take under it. An effort was made to maintain this trust as an executory devise, to be effectuated by legislation, but the court held that there was nothing in the will to support this theory.

In Gallagher *v.* Rowan's Admr., 86 Va. 823, the invalidity, on account of uncertainty, of a gift equally to "the cause of domestic and foreign missions," contingent on the failure of a prior estate, was a concessum rather than a decision.

In Fifield *v.* Van Wych, 94 Va. 557, a devise to two trustees, or to the "survivor of them, or to whomsoever they may select in case of their death, in trust for the benefit of the New Jerusalem Church (Swedenborgian) as they may deem best," was held to be void on the ground that "the beneficiaries are uncertain, the purposes of the trust wholly undefined, and the discretion of the trustees practically without limit."

Besides these cases, in which there was a total failure of the trusts in question, there was a partial failure in Hill's Executors *v.* Bowman, 7 Leigh 650, and Literary Fund *v.* Dawson, 10 Leigh 147. In the latter case Martin Dawson having undertaken to dispose of his residuary estate for educational purposes by the sixteenth clause of his will, or by the seventeenth clause if the sixteenth could not be carried out, the court declared the sixteenth clause to be void and sustained the alternate provision as an executory devise to be made effective by legislation. In the clause which was declared void the testator provided for the establishment by his executors of three seminaries of learning at designated places, and directed that any excess after erecting the same, should be "for the benefit of the said seminaries in equal proportions, to be used for the education of such youth as is not able to pay teacher's fees."

In Hill's Executors *v.* Bowman the following provision in the will of Thomas Hill was under consideration:

> "I give the money arising from the sales of the lands and tenements aforesaid, and the collection of the said outstanding debts, as well as all moneys which I may have in hand at the time of my death, in trust to my said executors, that they shall (as it is my will and desire) so dispose of the same for the purpose of aiding any of the members of my family, or any other person or persons who may be in distress, and whom they may think I would myself have assisted in such cases, confiding the disposition of the trust fund entirely to their discretion."

The words "any other person or persons" who may be in distress" were held to be too vague and uncertain, and the trust in favor of such persons was declared to be void; but in so far as the trust extended to the testator's family it was held to be good, and the court declared that it was not then called upon to decide who were comprehended by this term, nor whether the words "who may be in distress" should be considered as applying to them. In this case, indeed, there was discretionary power in the trustees to make that certain which was uncertain, but as to the persons other than the members of the testator's family, who might be in distress, this class might include everybody, and the beneficiaries intended were, therefore, not sufficiently defined for the proper exercise of discretionary power.

This completes the review of the Virginia cases in which charitable trusts have been declared void. In all of them the validity was predicated on uncertainty in the designation of the beneficiaries, or objects of the trusts; and in none of them did the trustees have discretionary power by means of which such uncertainty might be removed, or, as in the cases of Hill's Executors *v.* Bowman and Fifield *v.* Van Wyck, the limits were not definitely fixed within which such power could be properly exercised. It has, therefore, not been decided in Virginia that there may not be a valid trust for the benefit of persons to be selected by trustees from among a sufficiently designated class. As already pointed out, it was intimated by President Tucker in the Gallego case that such a trust would be valid, and in Baptist Association *v.* Hart, 4 Wheaton 1, on which the Gallego case and the whole line of cases following it, depend, the same intimation was made by Chief Justice Marshall. The bequest in that case being to an unincorporated association as trustees, he held that there was no grantee capable of taking under the will, and therefore no means of ascertaining the intended beneficiaries, on which point he reasons as follows:

> "There being no persons who can claim the right to execute this trust, are there any who, upon the general principles of equity, can entitle themselves to its benefits. Are there any to whom this legacy, were it not a charity, could be decreed? This question will not admit of discussion. Those for whose ultimate benefit the legacy was intended, are to be designated and selected by the trustees. It could not be intended for the education of all the youths of the Baptist denomination who were designated for the ministry, nor for those who were the descendents of his father, unless, in the opinion of the trustees, they should appear promising. These trustees being incapable of executing this trust, or even of taking it on themselves, the selection can never be made, nor the person designated who might take beneficially."

In concluding his opinion, he says:

> "The cestui que trust can be brought into being only by the selection of those who are named in the will to take the legacy in trust, and those who are so named are incapable of taking it. It is, perhaps, decisive of the question propounded

> to this court to say that the plaintiffs cannot take. But the rights of those who claim the beneficial interest have been argued at great length, and with great ability; and there would have been some difficulty in explaining satisfactorily the reasons why the plaintiffs cannot take, without discussing also the rights of those for whom they claim."

This decision rested, as these extracts show, on the incapacity of the trustees to take, and as there was no one, therefore, to exercise the power of selection intended to be vested in them, the uncertainty as to the beneficiaries resulted in consequence of that fact. It is a fair conclusion that if the trustees had been sufficiently designated, so that the beneficiaries could have been ascertained by their selection, the trust would have been sustained, and this conclusion is not inconsistent with the Virginia cases which are controlled by this decision.

In Hill's Executors *v.* Bowman this principle seems to have been distinctly recognized in a decision upholding the validity of a trust with discretionary power in the trustees for the purpose of aiding any members of the testator's family "who might be in distress;" for though the court did not determine whether this qualifying phrase applied to the beneficiaries of the testator's family, the language of the will plainly indicates that it was so intended; and, at any rate, the trust was sustained with the possibility of this construction expressly recognized in the opinion of the court. Frazier *v.* Frazier, 2 Leigh 642, and Fontaine *v.* Thompson, 80 Va. 229, appears not to be in harmony with this view; but in each of these cases there was a trust to be executed by a brother of the decedent, in the first place to make distribution among the testator's next of kin "according to their merits or deserts, as he may see at a future day what time may bring up;" and in the second case, to make distribution among the testatrix's next of kin "who may be needy, in such proportions and at such times as in his opinion may be best;" and in both cases the trustee died without having executed the trust. Whereupon the execution of the trust, which was clearly personal, became impossible, and the next of kin, without regard to their respective merits or needs, were held to be the beneficiaries of the bequests. In the first case the court did not discuss the question, and six months after the decision

in the second case the court by which it was decided handed down its decision in the Churchman case, in which it attempted to overrule the Gallego case, and to establish in Virginia the generally accepted doctrine as to charitable trusts. Neither of these cases, therefore, is conclusive against the principle recognized in Baptist Association *v.* Hart, and apparently recognized in the Gallego case, and acted on in Hill's Executors *v.* Bowman.

But of still greater significance in their bearing on this principle are two older cases, both antedating the Gallego case but not cited in it, which appear to recognize broadly the validity of charitable trusts whether the trustees are vested with discretionary powers or not. They are President and Professors of William and Mary College *v.* Hodgson and others, 6 Munf. 163, decided in 1818, and Overseers of the Poor of Richmond County *v.* Tayloe's Administrator, Gilmer 336, decided in 1821.

In the first of these cases the trust in question was created by a bequest in the will of William Ludwell Lee, the date of which is not shown, "to the President, Masters and Professors of William and Mary College, and their successors in office forever, of five hundred Winchester bushels of Indian corn, which is to be paid to them annually on the 25th day of December, for the use and benefit of a free school to be established in the centre of James City County;" to which is added a clause in the following words: "One thousand acres of the Hot Water tract of land is, by my desire, to stand pledged forever for the full and complete execution of this devise." Against the contention of the trustees it was held that the devise for the benefit of the free school was not a charge upon the testator's estate generally, but only upon the Hot Water tract of land. No other question appears to have been involved, and the validity of the trust was assumed as an undisputed fact. No point was made as to whether or not the trustees were an incorporated body, and what the fact was does not appear; but the objects of the trust could hardly have been within the scope of the College charter.

In Overseers of the Poor *v.* Tayloe's Administrator the following bequest, contained in the will of John Tayloe, which was recorded in July, 1779, was in question:

"I give to the minister and vestry of the Parish of Lunenburg, and their successors, the ministry and vestry of said parish, £500 sterling, in trust for the use of the poorest inhabitants of the said parish, being honest people; to be let to interest on good land security, or otherwise so laid out, that the interest or better profits thereof, be distributed with equity and justice by the minister and vestry aforesaid, among the poor aforesaid, every year at the lower church of the said parish on restoration day, etc., this legacy to continue forever."

The trustees appointed continued to distribute the charity until the year 1799, after which there was neither ministry nor vestry in the parish, and the right to administer the trust was claimed by the overseers of the poor under various Acts of Assembly, especially one of 1805 (Code 1819, Vol. II, p. 268), by which it was provided that all donations for charitable purposes made to vestries in parishes in which there had ceased to be vestries, should devolve on the overseers of the poor of the said parishes and be managed by them for the objects of the original trust. A decree entered in this case by the lower court, ordering the funds turned over to the overseers of the poor, was held to be erroneous in so far as it undertook to prescribe the form of investment, instead of leaving the investment to the discretion of the trustees, as provided in the will, and it was remanded to be reformed accordingly. The validity of the trust, which may be taken as a typical example of donations for charitable purposes, was implicitly recognized, and the trust enforced according to its terms; and, though the will creating the trust antedated the repeal of 43 Elizabeth, this case is nevertheless both an illustration and a demonstration, not only of the jurisdictional, but of the administrative competency of Virginia courts to deal with such trusts.

In the light of this review of the Virginia cases it is respectfully submitted that though the later cases are not in harmony with the earlier ones, which appear to recognize fully the common law doctrine of charitable trusts, they do not, in the points actually decided, repudiate the doctrine in toto, and are not inconsistent with the enforcement of a trust for a class, if the class is sufficiently defined and provision is made for the selection of the individual beneficiaries. And they are not conclu-

sive, therefore, against the recognition and application in the present case of the principle apparently approved by Marshall in Baptist Association *v.* Hart, and constantly applied in Virginia in the enforcement of religious and educational trusts under statutes, which may justly be regarded as merely declaratory of the common law with statutory additions. The principle is stated as follows in Perry on Trusts, § 732:

> "It is immaterial how uncertain, indefinite, and vague the cestui que trust or final beneficiaries of a charitable trust are, provided there is a legal mode of rendering them certain by means of trustees appointed or to be appointed. In other words, it is immaterial how uncertain the beneficiaries or objects are, if the court, by a true construction of the instrument, has power to appoint trustees to exercise the discretion or power of making the beneficiaries as certain as the nature of the trust requires them to be. Uncertainty as to the individual beneficiaries is characteristic of a charitable use. If the class from which the selection is to be made is limited so that the court can distribute or enforce the trust in case the trustee refuses to act, that is the most that is ever required. For example, a library gift for the benefit of the people of any city in the State is good. A gift to trustees to educate six orphan boys, to be selected and put to school by them, is uncertain, as the boys are uncertain until they are selected. To say that such a trust should not be executed, but that the heir should take the fund, because there is no orphan boy in the world that can come into court and claim the bequest, would be to subvert the foundation of all public charity."

But not only, in the present case, are the trustees vested with discretionary power sufficient to enable them to ascertain the individual beneficiaries within the designated class, but they are also authorized "if they deem it advisable" to procure a charter of incorporation and in a codicil the testator provides for the appointment of substitutes by the court if any of the trustees chosen by him should refuse to serve, by both of which provisions he shows that if anything should be legally necessary to make his will effective, it was his desire that it should be done. His purpose, therefore, being plain, and the charity intended clearly defined, the language of the will should be so construed as to sustain its validity, and if a corporate charter was neces-

sary for this purpose the provision authorizing the trustees to procure a charter if they should deem it "advisable" should be construed as binding upon them, requiring them at once to determine whether a charter was necessary, and if so to procure it. Under such a construction of the will this case would be brought within the principle of Literary Fund *v.* Dawson, 10 Leigh 147, and 1 Rob. 402; and Kinniard *v.* Miller's Executors, 25 Gratt. 107; and the will in question would be valid independently of the considerations already presented.

In the first of these cases the testator provided that certain property should be constituted by his executors a part of the literary fund of the State and the income therefrom used, in specified proportions, by the School Commissioners of Albemarle and Nelson Counties in the same way as the School Fund, with power in the Legislature to authorize the use of the principal for like objects and in the same proportions, and after defining the trust the testator added "an act of Assembly for said object supposed can be obtained." In sustaining the trust in this case the court said:

> "The will is equivalent to a devise of his real and personal estate to the executors, in trust for the purpose of procuring an act of Assembly with the necessary provisions for constituting the funds devised a part of the literary fund, in strict conformity with the terms, provisions and conditions of the will. By such an act of Assembly all the difficulties suggested by the fertile mind of the counsel will be avoided, and the benevolent intentions of the testator carried into complete effect. And as this act is to be obtained by the executors the contingency of its passage is within a life, or lives in being, and therefore not too remote. The case is thus very much the same as that of the Sailors Snug Harbor, 3 Peters 100."

The sole acting executor, W. W. Dawson, having declined to apply for the necessary legislation, it was applied for and obtained by the President and Directors of the Literary Fund, but the executor relying particularly on President Tucker's suggestion that the act was to be obtained by the executors, and that for that reason the contingency of its passage was not too remote, refused to recognize the validity of the act passed at the instance of the President and Directors of the Literary Fund,

claiming that they were without authority to apply for it, and that the act obtained without his consent was inoperative and void. But in the suit brought to enforce the trust this court sustained the act, holding that it was immaterial whether it was procured through the agency of the executor, or otherwise, and that he did not have the power to defeat the trust by refusing to do his duty. In the discussion of this question Judge Baldwin said:

> "It was, as I conceive, in nowise necessary that the testator should have contemplated the consent of his executors to the passage of the law, in order to relieve the contingency from the imputation of being too remote. Whether an executory devise tends to establish a perpetuity or not depends upon the testator's intention as to the time within which the contingency shall happen. It was never held that executory devises are to be governed by the rules of the common law as to common-law conveyances; the only question is whether the contingency is to happen within a reasonable time, or not, and that is to be determined by the testator's intent upon a fair and liberal interpretation of the whole will." (1 Rob. 402.)

In the pending case the will clearly shows that the testator intended that his purposes should be carried out within a reasonable time, and that the trustees should do, without delay, whatever might be necessary to that end, including the obtaining of a charter, if that should be necessary. This they have accordingly done, and have clothed themselves with corporate powers amply sufficient for the execution of the trust; and "upon a fair and liberal interpretation of the whole will," their act in so doing was within the intent of the testator and, if essential to the validity of the will, full effect should be given to it so as to avoid the failure of his charitable purpose.

The necessity for legislation in Literary Fund *v.* Dawson arose out of the incapacity of the Literary Fund, a State corporation created for general educational purposes, to receive and administer funds to be applied specially, as provided in the testator's will; and the question was whether the beneficial ownership of the property involved might not be held in suspense pending the passage of the necessary act, for a period exceeding that allowed by the rule against perpetuities. In Kinniard *v.* Miller the question was similar, the gift in that case also being to the

Literary Fund for the establishment of a manual labor school in the county of Albermarle, to be managed as directed in the will, and the executors were authorized and requested, if necessary, to petition the legislature for the passage of any laws which might be requisite for more effectually carrying out the objects and purposes of the clause providing for the establishment of such a school.

In both of these cases then, the necessity for acts of Assembly arose out of the corporate incapacity of the agency designated to administer the trust, the funds in the meantime remaining in the hands of the executors awaiting legislative action, which, it was contended, might be so long delayed as to result in a violation of the rule against perpetuities; but in the present case, though the language of the will would justify the application, if necessary, of the same principle applied in these cases in order to sustain the will, there is no incapacity in the trustees designated by the testator, and, as already shown, they are vested with discretionary powers sufficient to enable them to administer the trust.

Closely analagous to Literary Fund *v.* Dawson and Kinniard *v.* Miller, but recognizing far more liberal principles in favor of charitable trusts, is the old case of Charles *v.* Hunnicutt, 5 Call 311, decided in October, 1804, but not reported until 1833, after the decision of the Gallego case, and probably for that reason not referred to in it. In this case Cloister Hunnicutt, a Quaker of Sussex County, by his will dated April 13th, 1781, and recorded in October of that year, provided for the manumission of his slaves as follows:

> "My will and desire is, that the following negroes shall be manumitted on or before the first month next 1782, viz. Tom, Joe, Charles, Ben, Jenny and her child Charlotte. I give the above named negroes to the monthly meeting, of which I am a member, to be manumitted by such members of the said meeting as the meeting shall appoint."

The testator died on the same day on which he made his will, and in December following, after the will had been admitted to probate, the meeting of which he was a member appointed Edward Stabler and Wyke Hunnicutt, the latter being one of the executors of the will, to draw and execute an instrument

of manumission; and an act authorizing the manumission of slaves having been passed by the general assembly in May, 1782, no such law being in force when the will went into effect, the said Stabler and Hunnicutt, on the 6th of July, 1782, executed a deed of manumission accordingly. One of the executors, Pleasant Hunnicutt, a son of the testator, disregarding this deed, continued to hold the slaves in bondage as part of his father's estate, and in a suit brought by them to recover their liberty, defended his action on the grounds, among others, that the devise to the monthly meeting was void for uncertainty, and that emancipation not being lawful at the date of the will a subsequent statute would not avail to make it so. The deed was sustained by a unanimous court, consisting at that time of President Lyons and Judges Tucker, Roane, Fleming and Carrington, each of whom delivered an opinion. President Lyons said:

"Devises in favor of charities, and particularly those in favor of liberty, ought to be liberally expounded: And, upon the present occasion, it is fair to infer, that the testator meant that the deed of manumission should not take place until an act of assembly to authorize it, should pass; for he knew that the existing law forbid it, and that his society had been anxiously endeavoring to procure an enabling statute for that purpose from the legislature, which, it was generally believed, would shortly be obtained. This brings the case precisely within that of Pleasants *v.* Pleasants, 2 Call. 319, and puts an end to the objection founded upon the distinction between a present devise and one with a future aspect. The exception with respect to the supposed uncertainty in the bequest has no weight, for, to say nothing of the name by reputation of the monthly meeting, the description is, at most, imperfect only; and a court of equity would, if no appointment had been made, have supplied trustees, and compelled performance of the trust. Upon these points the cases cited by the appellants' counsel are perfectly satisfactory. Then, as the meeting appointed persons to fulfill the directions of the will, and they, in conformity thereto, executed the deed subsequent to the passage of the law, the emancipation was complete upon that event, and the appellants were entitled to sue at common law."

Judge Roane said:

"The cases cited by the appellants' counsel are satisfactory to show that under the liberal principles adopted in relation

to charities, the devisees in this instance were competent to take in the character of trustees. In that character they were at liberty, and even compellable to apply for a particular legislative act of emancipation, until the enaction of the general law of 1782; but after that event such application was unnecessary, and the deed of emancipation which they actually executed was legalized."

Judge Fleming said:

"The objection of uncertainty in the devise has no weight; for not only are bequests to charitable uses expounded favorably, but it is a rule that a devise is never construed to be void for uncertainty unless from necessity; for if there be a possibility of reducing it to certainty, it will be supported. Pow. Dev. 422. That doctrine is expressly applicable to the case before the court, for nothing is easier than to identify the characters who were intended to take during the interval between the death of the testator and the passage of the contemplated law, and consequently nothing more practicable than to give effect to the devise."

In applying the liberal principles expressed in these extracts, it was not understood by the court that they were dependent on 43 Elizabeth, for the particular charity enforced in this case (a trust for the liberation of slaves) was not covered by that statute, and was expressly referred to by Judge Roane "as that emphatical species of charity which is infinitely stronger than any of those enumerated in the statute of Elizabeth."

First and last, then, ample warrant may be found in the Virginia decisions to sustain the trust now under consideration; and the cases apparently adverse, if strictly limited in their authority as precedents to the questions actually presented and decided, are not conclusive against it. Where the trusts have been held to be void the decisions appear to be based either on the ground that the courts were without jurisdiction, or that they were without administrative capacity; but as jurisdiction is disclaimed only when and because the trusts are so vague and indefinite that they are for that reason not susceptible of enforcement, it is at last a question merely of administrative capacity, depending on practical considerations, and not on whether 43 Elizabeth, or any other statute is, or is not in force, for an actual defect of capacity cannot be cured by statute; and so, if

practicable enforceability is the test, or criterion determining jurisdiction, it must be applied without distinction, and it would be clearly anomalous and illogical to hold that jurisdiction exists as to certain classes of charitable trusts sanctioned by statute, and not as to others not so sanctioned, but which differ only in their object and present the same or similar difficulties, and impose no greater task or burden on the administrative powers of the courts. If jurisdiction, then, depends only on the practical ability of the courts to administer a trust, and this is the only ground on which it can be made to depend with any show of reason, such jurisdiction cannot consistently be extended to special classes of trusts and withheld from others not less susceptible of enforcement, and there is no reason why the statement of President Keith in Clark *v.* Oliver, 91 Va. 421, that the inherent powers of a court of equity "to compel a due execution of a trust, charitable or otherwise," are ample to that end, should not be made to apply to all trusts, charitable or otherwise, without distinction. This, indeed, upon a careful analysis, seems to be about the result of the Virginia decisions, and the acceptance of this conclusion, though it might necessitate some modification of doctrines too broadly stated in some of the cases, would violate no rule of property, and would unsettle no titles or dispositions of estates, but, on the contrary, would confirm them; and at the same time it would bring Virginia substantially into line with all the other States and countries, with but few exceptions, which administer the same system of jurisprudence, and would unequivocally establish principles of law more in harmony with modern needs and conditions and with the present policy of the State, as indicated by its statutes authorizing, without restriction, the establishment under corporate charters of charitable trusts of all sorts and descriptions. The times have greatly changed since President Tucker in the Gallego case referred to the now almost universally accepted doctrine on this subject as a "pernicious principles," and as "the wretched policy of permitting the whole property of society to be swallowed up in the insatiable gulf of public charities."

For the foregoing reasons your petitioners respectfully submit that the decree complained of is erroneous, and pray that an

appeal and supersedeas thereto may be granted, and that the same may be reviewed and reversed.

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Note.

See Editorial, 8 VA. LAW REG. 280, commenting on an amendment to § 1398 and kindred sections of the Code; miscellaneous note, 3 VA. LAW REG. 537, commenting on the decision of Fifield *v.* Van Wyck, 94 Va. 557; and see letter from Judge Burks construing the Churchman decision, published in 3 VA. LAW REG. 539. By the amendment of the Code, § 1420, at the legislative session of 1914 (Acts, p. 414), gifts, grants, devises and bequests for charitable purposes are made valid, and it is interesting to note that the trust held in this case to be too vague, uncertain and indefinite to be enforced would be held to be enforceable under the law as it now is.